Paragon Union Bhd v Prestamewah Development Sdn Bhd & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCC) (W)-1202–07 OF 2014 AND W-02(NCC) (W)-1238–07 OF 2014
ALIZATUL KHAIR, ZABARIAH YUSOF AND HARMINDAR SINGH JJCA
16 MARCH 2018

Contract — Illegality — Agreement — Nine agreements entered by companies or nominees and companies controlled by parties — Whether nine agreements constituted composite agreement to implement take-over scheme — Whether agreements were illegal — Whether parties were in pari delicto if agreements were illegal — Entitlement to refund — Contracts Act 1950 — Securities Commission Act 1993

There were two appeals which arose from three consolidated suits, namely Suits 2053, 737 and 445. The appeals revolved around a series of nine agreements, guarantees and indemnities which were entered between Lim Jun Wai and/or his companies or nominees with Kong See Kuan and Tan Onn Poh as well as companies controlled by them, namely Asia Avenue Sdn Bhd and Paragon Union Bhd. In Suit 2053, the plaintiffs sought for a declaration that the nine agreements be rescinded and an order that the plaintiffs were entitled to set off the loss and damages suffered by them. In Suit 737, Paragon Union Bhd alleged that Liw Jun Wai and Prestamewah Development Sdn Bhd had breached the Dominon Park Sdn Bhd agreement ('the DPSB agreement') and sought for the return of RM18m which Paragon Union Bhd had paid to Liw Jun Wai and Prestamewah Development Sdn Bhd under the DPSB agreement. Despite the said payment, Liw Jun Wai and Prestamewah Development Sdn Bhs refused to transfer the shares in DPSB to Paragon Union Bhd. Meanwhile, in Suit 445, Kong See Kuan and AASB sued, inter alia, Liw Jun Wai, Bijak Gagah Sdn Bhd and Paragon Union Bhd. The reliefs sought by the plaintiffs were for a declaration that the sales and purchase agreement between Kong See Kuan as vendor and Liw Jun Wai as purchaser for Kong See Kuan's 75% stake in AASB had been lawfully terminated. At the end of the full trial, the High Court Judge declared that the nine agreements were void and unenforceable for illegality. All other actions filed by the respective parties were dismissed. Hence this appeal. The issues that arose for the court's determination were: (a) whether the nine agreements constituted a composite agreement to implement a take-over scheme; (b) whether the agreements were illegal; (c) if the agreements were illegal, whether the parties were *in pari delicto*; and (d) whether Paragon Union Bhd was entitled to the refund of RM18m which it had paid to the plaintiffs for the DPSB agreement.

Held, dismissing the appellant's appeal:

(1) The agreements constituted a composite transaction for the purpose of the taking over of Paragon Union. The arrangement of the parties was contained in the several agreements which were subsequently executed simultaneously at AASB's business address. Therefore, the trial judge did not err when she found that the nine agreements constituted a composite transaction to implement the take-over scheme. Paragon Union Bhd could not be blowing hot and cold as to its stand on the single transaction issue for the purpose of the take-over scheme. It was estopped from denying that the DPSB agreement was part of the composite transaction in the taking-over of Paragon Union Bhd (see para 45).

(2) The take-over scheme was successfully executed and all parties have participated in the take-over scheme and had committed an offence by failing to comply with s 33B(1), either as a principal or as an abettor to circumvent the requirement of a mandatory general offer to enable Liw Jun Wai to take control of Paragon Union Bhd. She held that, in this regard, all parties committed an offence under s 3B of the Securities Commission Act 1993. The High Court judge did not err when she made such findings. The agreements were illegal and the parties were in pari delicto or 'in equal fault' (see paras 78–82).

(3) The nine agreements were not enforceable due to s 24(a), (b) and/or (e) of the Contracts Act 1950 as they were against public policy. In view of the illegalities, the nine agreements are forbidden and if permitted, would defeat the statutory provisions (see paras 92–93).

[Bahasa Malaysia summary

Terdapat dua rayuan yang berbangkit dalam tiga guaman yang digabungkan iaitu Guaman 2053, 737 dan 445. Rayuan-rayuan ini berkisar satu siri sembilan perjanjian, jaminan dan indemniti yang dimasuki di antara Lum Jun Wai dan/atau syarikat-syarikatnya atau penama dengan Kong See Kuan dan Tan Onn Poh serta syarikat-syarikat yang dikawal oleh mereka khususnya Asia Avenue Sdn Bhd dan Paragon Union Bhd. Dalam Guaman 2053, plaintif-plaintif memohon pengisytiharan agar sembila perjanjian tersebut dibatalkan dan satu perintah bahawa plaintif-plaintif berhak menolak-selesai kehilangan dan kerugian yang mereka alami. Guaman 737, Paragon Union Bhd mendakwa Liw Jun Wai dan Prestamewah Development Sdn Bhd telah melanggar perjanjian Dominon Park Sdn Bhd ('perjanjian DPSB') dan memohon pemulangan RM18 juta yang Paragon Union Bhd telah membayar Liw Jun Wai dan Prestamewah Development Sdn Bhd bawah perjanjian DPSB. Walaupun bayaran telah dibuat, Liw Jun Wai dan Prestamewah Development Sdn Bhd enggan memindahkan saham-saham dalam DPSB kepada Paragon Union Bhd. Sementara itu, dalam Guaman 445, Kong See Kuan dan AASB menyaman, antara lain, Liw Jun Wai, Bijak Gagah Sdn Bhd

dan Paragon Union Bhd. Relif-relif yang dipohon oleh plaintif-plaintif adalah bagi deklarasi agar perjanjian jual beli antara Kong See Kuan sebagai penjual dan Liw Jun Wai sebagai pembeli bagi amanah 75% milik Kong See Kuan telah ditamatkan dengan sah. Pada penghujung perbicaraan penuh, Hakim Mahkamah Tinggi mengisytiharkan bahawa sembilan perjanjian tidak sah dan tidak boleh dikuatkuasakan atas sebab ketaksahan. Kesemua tndakan difailkan oleh pihak-pihak ditolak. Oleh itu rayuan ini. Isu-isu yang timbul bagi pemutusan mahkamah adalah: (a) sama ada sembilan perjanjian tersebut membentuk perjanjian komposit untuk skima pengambilalihan; (b) sama ada perjanjian-perjanjian tersebut tidak sah; (c) jika perjanjian-perjanjian tersebut tidak sah, sama ada pihak-pihak tersebut *pari delictor*; dan (d) sama ada Paragon Union Bhd berhak mendapat pemulangan semula RM18 juta yang telah dibayar kepada plaintif-plaintif bagi perjanjian DPSB.

Diputuskan, menolak rayuan perayu:

(1) Perjanjian-perjanjian tersebut membentuk transaksi komposit bagi tujuan pengambilalihan Paragon Union. Perancangan-perancangan pihak-pihak terkandung dalam beberapa perjanjian yang seterusnya dimeterai bersama di alamat perniagaan AASB. Oleh itu, hakim bicara tidak terkhilaf dalam memutuskan bahawa sembilan perjanjian tersebut membentuk transaksi komposit untuk melaksanakan skima pengambilalihan. Paragon Union Bhd tidak boleh berbolak-balik tentang pendiriannya mengenai transaksi ringkas bagi tujuan skima pengambilalihan. Ia diestop daripada menafikan bahawa perjanjian DPSB sebahagian transaksi komposit dalam pengambilalihan Paragon Union Bhd (lihat perenggan 45).

(2) Skima pengambilalihan berjaya dilaksanakan dan pihak-pihak mengambil bahagian dalam skima pengambilalihan dan melakukan kesalahan dengan gagal mematuhi s 33B(1), sama ada secara prinsipal atau rakan subahat untuk memintas keperluan tawaran am mandatori untuk membolehkan Liw Jun Wai mengambil alih Paragon Union Bhd. Beliau memutuskan bahawa, bagi hal ini, kesemua pihak telah melakukan kesalahan bawah s 3B Akta Suruhanjaya Sekuriti 1993. Hakim Mahkamah Tinggi tidak terkhilaf dalam membuat dapatan demikian. Perjanjian-perjanjian ini tidak sah dan pihak-pihak in pari delicto atau sama-sama bersalah (lihat perenggan 78–82).

(3) Sembilan perjanjian tersebut tidak boleh dikuatkuasakan akibat s 24(a), (b) dan/atau (e) Akta Kontrak 1950 kerana kesemuanya bertentangan dengan polisi awam. Berdasarkan ketaksahan, sembilan perjanjian tersebut dilarang dan jika dibenarkan, akan menewaskan peruntukan statutori (lihat perenggan 92–93).]

Notes

For cases on agreement, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 6034–6039.

Cases referred to

Adams Offshore Ltd v TL Offshore and Hallin Marina Systems Int Ltd and Anor (Third Party) [2009] MLJU 175; [2009] 1 LNS 197, HC (not folld)
Mohamed Isa & Ors v Abdul Karim & Ors [1970] 2 MLJ 165 (refd)
New Churulia Coal Co Ltd v Union of India AIR 1956 Cal 138, HC (not folld)
Palaniappa Chettiar v Arunasalam Chettiar [1962] AC 294, PC (refd)
Perwira Affin Bank Bhd v Sardar Mohd Roshan Khan [2010] MLJU 2220; [2011] 5 CLJ 886, CA (refd)
Petaling Tin Bhd v Lee Kian Chan & Ors [1994] 1 MLJ 657, SC (folld)
Sajan Singh v Sardara Ali [1960] AC 167, PC (refd)
Saunders and another v Edwards and another [1987] 1 WLR 1116, CA (refd)
Securities Commission v Up & Famous Sdn Bhd & Ors [2010] 7 MLJ 701; [2010] 4 CLJ 638, HC (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 MLJ 324; [2001] 1 CLJ 779, CA (folld)
Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd [2014] 3 MLJ 301; [2014] 3 CLJ 141, FC (folld)
Yam Kong Seng & Anor v Yee Weng Kai [2014] 4 MLJ 478, FC (refd)

Legislation referred to

Companies Act 1965 s 132C, 132C(1), (1)(a), (1A), (2), (5)
Contracts Act 1950 ss 24, 24(a), (b), (e), 66
Malaysian Code On Take-Over and Mergers 1998 ss 6, 6(1)(a), (4), 7(a)
Rules of Court 2012 O 21 r 3
Securities Commission Malaysia Act 1993 ss 33, 33(1), (1)(ii), (2), (2)(a), (2)(b), (4), 33B, 33B(1), (2), (4), 157(b), (c)

Appeal from: Civil Suit Nos MT 1–22–385 of 2009, D8–22–737 of 2009 and D-22–445 of 2009 (High Court, Kuala Lumpur)

Murali Menon (Nor Adilah with him) (Jaffar Menon) in Civil Appeal No W-02(NCC) (W)-1202–07 of 2014 for the appellant.
Malik Imtiaz (Pavendeep Singh and Mohd Rizal with him) (Bahari & Bahari) in Civil Appeal No W-02(NCC) (W)-1238–07 of 2014 for the appellant.
Nahendren Navaretnam (Alex Chan and Denis Goh with him) (Wong Kian Kheong) in Civil Appeal Nos W-02(NCC) (W)-1202–07 of 2014 and W-02(NCC) (W)-1238–07 of 2014 for the respondent.

Zabariah Yusof JCA:

[1] There are two appeals before us, namely:

(a) W-02(NCC)(W)-1202–07 of 2014 ('Appeal 1202'); and

(b) W-02(NCC)(W)-1238–07 of 2014 ('Appeal 1238'),

which arose from the decision of the learned High Court judge dated 18 June 2014 after a full trial of three consolidated suits, ie:

(a) 22NCC-2053 of 2010 ('Suit 2053');

(b) 22–737 of 2009 ('Suit 737'); and

(c) 22–445 of 2009 ('Suit 445').

[2] The parties to the relevant suits in the High Court are as follows:

Item	Suit No	Plaintiff/s	Defendant/s
(i)	Suit 2053	1. *Liw Jun Wai*	1. *Tee Guan Pian*
		2. Chaw Choi Kew @ Chow Choi Kew	2. Tan Hong Kien
		3. Prestamewah Developmen Sdn Bhd	3. Tan Onn Poh
		4. Bijak Gagah Sdn Bhd	4. Kong See Kuan
		5. Projek Perwira Sdn Bhd	5. *Paragon Union Bhd*
(ii)	Suit 737	*Paragon Union Berhad*	1. Prestamewah Development Sdn Bhd
			2. *Liw Jun Wai*
(iii)	Suit 445	1. Kong See Kuan	1. *Liw Jun Wai*
		2. Asia Avenue Sdn Bhd	2. Quah Ban Hoo
			3. Soong Kit Kong Julian
			4. Benny Soh Seow Leng
			5. Rohaizal bin Idris
			6. Bijak Gagah Sdn Bhd
			7. *Paragon Union Bhd*

[3] In this judgment, whenever the word 'plaintiffs' or 'defendants' appears, it refers to the plaintiffs and the defendants in Suit 2053 at the High Court, as the parties in Suit 445 did not appeal against the decision of the learned trial judge. Otherwise, they will be referred to by their names.

[4] The subject matter of the appeals herein is in relation to transactions involving a series of nine agreements, guarantees and indemnities, that were

entered between Liw Jun Wai and/or his companies or nominees with Kong See Kuan and Tan Onn Poh as well as companies controlled by them, namely Asia Avenue Sdn Bhd and Paragon Union Bhd.

BACKGROUND

The nine agreements

[5] As stated earlier, the appeals before us revolve around a series of nine agreements which are as follows:

(a) a sales and purchase agreement between Liw Jun Wai and Prestamewah Development Sdn Bhd as vendors and Paragon Union Bhd as purchasers for all the shares in Dominion Park Sdn Bhd ('the DPSB agreement');

(b) a letter of guarantee and indemnity given by Liw Jun Wai and Prestamewah Development Sdn Bhd to Paragon Union Bhd in respect of the DPSB agreement ('the DPSB guarantee');

(c) a sales and purchase agreement between Kong See Kuan as vendor and Liw Jun Wai as purchaser for Kong See Kuan's 75% stake in Asia Avenue Sdn Bhd ('AASB') ('the SPA with Kong See Kuan');

(d) a letter of guarantee and indemnity given by Liw Jun Wai to Kong See Kuan ('Kong See Kuan's guarantee agreement');

(e) a loan agreement between Bijak Gagah Sdn Bhd and AASB ('the loan agreement');

(f) a settlement agreement between Projek Perwira Sdn Bhd and Paragon Union Bhd ('the settlement agreement');

(g) a letter of guarantee and indemnity given by Liw Jun Wai to Paragon Union Bhd in respect of the settlement agreement ('the Paragon guarantee agreement');

(h) a sales and purchase agreement between Tan Onn Poh as vendor and Chaw Choi Kew @ Chow Choi Kew as purchaser for Tan Onn Poh's 25% equity in AASB ('the SPA with Tan'); and

(i) a personal guarantee given by Liw Jun Wai to Tan Onn Poh as regards a put and call option pursuant to sales and purchase agreement with Tan Onn Poh ('Tan's guarantee').

[6] Liw Jun Wai and Prestamewah Development Sdn Bhd received RM18m from Paragon Union Bhd pursuant to the DPSB agreement.

The parties

[7] For convenience and to appreciate the transactions involved, it is pertinent to state the background of parties, which are as follows.

[8] Liw Jun Wai:

(a) majority shareholder as well as managing director of Prestamewah Development Sdn Bhd;

(b) beneficial owner of all shares in Bijak Gagah Sdn Bhd and Projek Perwira Sdn Bhd; and

(c) owns 25% equity in Dominion Park Sdn Bhd ('DPSB') while Prestamewah Development Sdn Bhd owns the remaining 75% equity in DPSB.

[9] Chaw Choi Kew @ Chow Choi Kew:

(a) nominee of Liw Jun Wai; and

(b) holds Tan Onn Poh's shares in AASB upon trust solely and absolutely for the benefit of Liw Jun Wai.

[10] Tee Guan Pian:

(a) a qualified chartered accountant and certified public accountant; and

(b) from 1995–2008 practiced as a partner in an audit and accounting firm known as Messrs Anuarul Azizan Chew & Co ('AACC'). Thereafter he was a partner in another audit and accounting firm known as UHY Diong Advisory (KL) Sdn Bhd ('UHY'). At all times Messrs Anuarul Azizan Chew & Co was the external auditor for AASB. UHY Diong Advisory (KL) Sdn Bhd was the auditor for Paragon Union Bhd for 2008.

[11] Tan Hong Kien:

(a) Executive Director of Paragon Union Bhd; and

(b) nephew of Tan Onn Poh.

[12] Tan Onn Poh:

(a) non executive director of AASB and Managing Director of Paragon Union Bhd; and

(b) owns 25% equity in AASB.

[13] Kong See Kuan:

(a) owns 75% equity in AASB; and

(b) at all times a director of AASB.

[14] Asia Avenue Sdn Bhd ('AASB'):

(a) owns 48.48% shares in Paragon Union Bhd; and

(b) majority shareholder of Paragon Union Bhd.

[15] Paragon Union Bhd is a public listed company listed on the Bursa Malaysia at the material time.

The pleaded case in Suit 2053

[16] In August 2008, Liw Jun Wai, Prestamewah Development Sdn Bhd, Bijak Gagah Sdn Bhd and Projek Perwira Sdn Bhd entered into seven agreements ie:

(a) DPSB agreement;

(b) DPSB guarantee agreement;

(c) SPA with Kong See Kuan;

(d) Kong See Kuan's guarantee agreement;

(e) the loan agreement;

(f) settlement agreement; and

(g) Paragon's guarantee agreement.

[17] In November 2008, Tan Onn Poh and Liw Jun Wai entered into the following two agreements:

(a) SPA with Tan; and

(b) Tan's guarantee.

[18] Tee Guan Pian and Tan Hong Kien were the representatives of Tan Onn Poh and Kong See Kuan.

[19] Kong See Kuan, Tan Onn Poh and/or their agents, Tee Guan Pian and Tan Hong Kien, made various representations to the plaintiffs inducing them to enter into the nine agreements.

[20] After the nine agreements were executed, payments were made by Paragon Union Bhd to the plaintiffs.

[21] Although the nine agreements were ex facie lawful, the nine agreements formed a composite transaction and the nine agreements were designed and employed by Tee Guan Pian for one purpose only, namely to take over Paragon Union Bhd (take-over scheme) without complying with the provisions of the Malaysian Code on Take-Over and Merger 1998 as well as the statutory provisions of the Securities Commission Malaysia Act 1993, the Companies Act 1965 and the listing requirements of Bursa Malaysia.

[22] A summary of the take-over scheme is as follows:

(a) Paragon Union Bhd would purchase DPSB from Liw Jun Wai and Prestamewah Development Sdn Bhd for the sum of RM18m. It was pleaded that representations were made by Tee Guan Pian and Tan Hong Kien that another RM10.5m would be made available to Liw Jun Wai when he takes over Paragon Union Bhd ('the representations'). This additional payment of RM10.5m would be paid by Tan Onn Poh and Kong See Kuan. The actual purchase consideration for DPSB agreement was RM28.5m;

(b) Liw Jun Wai would utilise the proceeds of the sale to acquire Kong See Kuan's shares in AASB through the loan agreement;

(c) Tan Onn Poh's shares in AASB would be directly acquired by Liw Jun Wai;

(d) the settlement agreement was to resolve a long outstanding civil action between Paragon Union Bhd and the promoters of Paragon Union Bhd which needed to be settled before the take-over scheme; and

(e) when the take-over scheme was completed:

(i) in respect of shareholding, Liw Jun Wai would have control of all the voting rights in AASB (which ultimately controls Paragon Union Bhd); and

(ii) in respect of payment, Liw Jun Wai was only required to pay for Tan Onn Poh's shares in AASB in order to have control over AASB and Paragon Union Bhd. Kong See Kuan's shares in AASB would be funded by Paragon Union's funds as a result of Liw Jun Wai's capital injection.

[23] It was pleaded that Tan Onn Poh and Kong See Kuan through their agents, Tee Guan Pian and Tan Hong Kien, made the representations to induce the plaintiffs to enter into the nine agreements (refer to para 23 of the statement of claim in Suit 2053). Subsequently, the plaintiffs found out that the representations were not true, which resulted in the plaintiffs instructing their solicitors to rescind the nine agreements.

[24] The plaintiffs also pleaded that Tee Guan Pian and Tan Hong Kien owed fiduciary duties and/or common law duty of care to the plaintiffs and they had both breached their respective duties to the plaintiffs by reason of the matters set out above.

[25] The plaintiffs contended that the take-over scheme, was devised in a manner that would circumvent statutory as well as the regulatory requirements of Bursa Malaysia namely s 6(1)(a) and (4) of Malaysian Code on the Take-Over and Merger 1998 as well as other statutory provisions, namely s 132C of the Companies Act 1965 and paras 10.05 and 10.06 of Chapter 10 of the Listing Requirements of Bursa Malaysia, when Paragon Union Bhd entered into the DPSB agreement without the consent of Paragon Union Bhd's shareholders in an extra ordinary general meeting held for that purpose.

[26] The plaintiffs contended that the purchase price of the DPSB Shares were at all times RM28.5m. The defendants have contravened the law by reducing on paper the purchase price of the DPSB Shares to RM18m to circumvent the law and statutory requirements so as to give the effect that the acquisition was not of substantial value, which would trigger the requirement under s 132C(1)(a) of the Companies Act 1965.

[27] The plaintiffs sought for a declaration that the nine agreements be rescinded and an order that the plaintiffs are entitled to set off the loss and damages suffered by them from the RM18m received by the plaintiffs pursuant to the sales and purchase agreement between Liw Jun Wai and Prestamewah Development Sdn Bhd as vendors and Paragon Union Bhd as purchaser for all the shares in Dominion Park Sdn Bhd (the DPSB agreement). Save and except for this relief, the other claims and causes of actions (misrepresentation, breach of fiduciary duty and/or common law duty of care to the plaintiffs) by the plaintiffs were abandoned.

The pleaded case in Suit 737

[28] Paragon Union Bhd alleged that Liw Jun Wai and Prestamewah Development Sdn Bhd had breached the DPSB agreement and sought for the return of RM18m which Paragon Union Bhd had paid to Liw Jun Wai and Prestamewah Development Sdn Bhd under the DPSB agreement. Despite payment of RM18m made by Paragon Union Bhd, Liw Jun Wai and Prestamewah Development Sdn Bhd refused to transfer the shares in DPSB to Paragon Union Bhd.

[29] In addition, Paragon Union Bhd is also claiming for ascertained and liquidated damages of RM1.8m.

[30] In defence, Liw Jun Wai and Prestamewah Development Sdn Bhd pleaded that the DPSB agreement was part of a composite transaction to implement the take-over scheme and relied on the defence of set off.

The pleaded case in Suit 445

[31] Kong See Kuan and AASB sued, amongst others, Liw Jun Wai, Bijak Gagah Sdn Bhd and Paragon Union Bhd.

[32] The reliefs sought by the plaintiffs was for a declaration that the sales and purchase agreement between Kong See Kuan as vendor and Liw Jun Wai as purchaser for Kong See Kuan's 75% stake in AASB, had been lawfully terminated.

Except for Liw Jun Wai, Bijak Gagah Sdn Bhd and Paragon Union Bhd, the action was subsequently discontinued against the other defendants.

In this suit, AASB had filed an application in Kuala Lumpur High Court for an interlocutory injunction, inter alia, to restrain Liw Jun Wai's directors in Paragon Union Bhd from acting as Paragon Union Directors until Paragon Union Bhd convene an EGM of its shareholders to remove Liw Jun Wai's directors in Paragon Union Bhd.

[33] In defence, Liw Jun Wai and Bijak Gagah Sdn Bhd pleaded that the SPA with Kong See Kuan was part of a composite transaction to implement the take-over scheme and by reason of the matters pleaded in Suit 2053, Kong See Kuan and AASB have no claim against Liw Jun Wai and Bijak Gagah Sdn Bhd.

DECISION AND FINDINGS OF THE TRIAL JUDGE

[34] At the end of the full trial, the learned High Court judge declared that the nine agreements are void and unenforceable for illegality. All other actions filed by the respective parties were dismissed and parties were ordered to bear their own costs.

[35] In arriving at her decision, the learned trial judge made the following findings of fact:

(a) that the nine agreements formed a single composite transaction with one sole purpose, namely to enable Liw Jun Wai to take over Paragon Union Bhd, which is a public listed company ('take-over scheme');

(b) the take-over scheme was derived from the evidence of Liw Jun Wai which was corroborated by the evidence of Quah Ban Hoo;

(c) the parties' conduct in signing the nine agreements at the same time on 18 August 2008 in the same place ie 'Regal House' proved that the nine agreements were part of a composite transaction;

(d) Kong See Kuan's admission in her affidavit (in support of her application for an injunction in Suit 445) corroborated Liw Jun Wai' evidence on the existence of the take-over scheme;

(e) Tee Guan Pian was the 'master mind' of the entire take-over scheme or mechanism upon which Paragon Union Bhd would be taken over;

(f) Tan Hong Kien, who is an executive director of Paragon Union Bhd was actively involved in the implementation of the take-over scheme;

(g) the take-over scheme of Paragon Union Bhd was successfully implemented, but was tainted by illegalities as it purported to circumvent various statutory as well as regulatory requirements. The nine agreements are illegal because its object (the take-over scheme) is:

(i) forbidden by ss 33B(1), (2), (4), 157(b) and (c) of the Securities Commission Act 1993 ('the SCA') read with ss 6(1)(a), (4) and 7(a) of the Malaysian Code On Take-Over and Mergers 1998 ('the 1998 Code'), within the meaning of s 24(a) of the Contracts Act 1950;

(ii) of such a nature that if permitted, would defeat the aforesaid statutory provisions including stated in s 24(b) of the Contracts Act 1950,

and therefore the nine agreements are void.

(Refer to para 76 of the grounds of judgment of the learned trial judge.)

(h) the parties participated and took active steps to conceal the illegalities and that parties are *in pari delicto* in respect of the illegalities;

(i) parties intended to circumvent the requirement under s 132C(1)(a) of the Companies Act 1965 by intentionally reducing the consideration (to RM18m when the actual purchase price was RM28.5m) in the DPSB agreement, thus committing an offence under s 132C(5) of the same;

(j) Liw Jun Wai had acted in concert with the other parties to enable him to take control of Paragon Union Bhd and thereby committed an offence under s 33B(4) of the SCA 1993;

(k) the learned trial judge rejected the relief sought by Paragon Union Bhd for the refund of RM18m. She held that Paragon Union Bhd had participated in the illegal transaction and did not come to court with clean hands. All the parties in this case had full knowledge of the illegality at the time when they entered into the nine agreements. Hence the learned trial judge did not grant any relief under s 66 of the Contracts Act 1950 to Paragon Union Bhd.

[36] Dissatisfied with the decision of the learned High Court judge, Paragon Union Bhd and Tee Guan Pian appealed, which are Appeal 1202 and Appeal 1238 respectively.

[37] It is pertinent to note at this juncture that, at the trial and during closing submission in the High Court, the plaintiffs elected to proceed on illegality and abandoned their other pleaded case (which are for inducement and misrepresentation, breach of duty of care and breach of fiduciary duty) against Tee Guan Pian. The High Court then proceeded to dismiss the plaintiffs' suit against Tee Guan Pian.

Although the learned trial judge confirmed that the plaintiffs have abandoned their claim against Tee Guan Pian at the submission stage after the conclusion of the trial, the learned trial judge continued to make certain statements and findings of fact against Tee Guan Pian in her grounds of judgment. It was submitted by counsel for Tee Guan Pian that the remarks and findings of fact by the learned trial judge in her grounds were unfounded and had grossly tarnished Tee Guan Pian's name and reputation. The finding of facts had also caused serious injustice to Tee Guan Pian and damaged his reputation as a senior practicing auditor.

[38] Counsel for Tee Guan Pian urged this court to exercise its inherent jurisdiction to expunge the remarks made against Tee Guan Pian by the learned trial judge to prevent abuse of process of court or otherwise to secure the ends of justice.

OUR FINDINGS

[39] After hearing submissions from parties and perusing through the appeal records ('AR'), we hereby unanimously dismiss the appeal by Paragon Union Bhd (Appeal No 1202) in part. We however order that the plaintiffs are to refund the RM18m to Paragon Union Bhd.

[40] We also dismiss the appeal by Tee Guan Pian (Appeal No 1238) which was to expunge the oral evidence of Tee Guan Pian at the trial and the finding of facts by the learned trial judge against Tee Guan Pian.

[41] Our reasons for so doing now follow.

Issues

[42] The issues to be determined are:

(a) whether the nine agreements constituted a composite agreement to implement the take-over scheme;

(b) whether the agreements are illegal (issue on illegality):

(i) what is the purchase consideration of the DPSB agreement dated 19 August 2008; and

(ii) whether there was a substantial acquisition of Paragon Union Bhd by the plaintiffs;

(c) if the agreements are illegal, whether parties are *in pari delicto*;

(d) whether Paragon Union Bhd is entitled to the refund of RM18m which it had paid to the plaintiffs for the DPSB agreement; and

(e) whether this court should expunge the remarks made by the learned trial judge in relation to Tee Guan Pian that he is the mastermind of the whole take-over scheme.

Whether the nine agreements constituted a composite agreement to implement the take-over scheme

[43] The plaintiffs in Suit 2053 submitted that there was a take-over scheme of Paragon Union Bhd if the nine agreements are considered together. It was contended that the nine agreements formed one transaction to facilitate the take-over scheme whilst the defendants contended the main SPA agreements, namely, the DPSB agreement and the AASB agreement are separate and independent agreements as they are only privy to the parties in the agreements.

[44] In coming to the conclusion that the nine agreements constituted a composite transaction to implement the take-over scheme of Paragon Union Bhd, the learned trial judge relied extensively on the following evidence:

(a) the various emails between the parties namely, Tee Guan Pian, Quah Ban Ho, Tan Hong Kien and Linda Goh;

(b) the several meetings between Tee Guan Pian, Liw Jun Wai and Tan Hong Kien, which discussed the various agreements to be entered into;

(c) the agreements were executed and signed at the same period of time on 18 August 2008 at the same place at Regal House; and

(d) Kong See Kuan's sworn admission in an affidavit which was used to support her application for an injunction in Suit 445, as corroborative evidence of the existence of a composite transaction for the purpose of the take-over scheme. The learned trial judge attached great weight to Kong See Kuan's sworn admission at paras 28–29 of her affidavit (refer to p 3087 of RA *Jld* 10 *Bahagian* C).

[45] Our perusal of the evidence, show that, they support the contention of the plaintiffs that the nine agreements do form a composite transaction for the sole purpose of the taking over of Paragon Union Bhd. We say so for the following reasons:

(a) we disagree with the submission of the defendants that the two sales and purchase agreements of the AASB shares are only privy to the parties stated therein. The nine agreements must be looked at together, the contents of which, disclose an arrangement between the various parties, which were executed simultaneously, which led to one primary aim, ie to facilitate the taking over of Paragon Union Bhd by Liw Jun Wai.

The plan of the take-over scheme started with the sale of AASB shares belonging to Kong See Kuan and Tan Onn Poh to Liw Jun Wai or his nominees (Chaw Choi Kew @ Chow Choi Kew). These are the 'SPA with Kong See Kuan' and the 'SPA with Tan' as mentioned in paras 5(c) and 5(h) of this judgment. The purchase of these AASB shares would result in Liw Jun Wai having control of Paragon Union Bhd as both Kong See Kuan and Tan Onn Poh were the only directors who held the shares of AASB. AASB in turn, owns the majority of the shareholding in Paragon Union Bhd. In the words of Tee Guan Pian, when he mooted the idea of taking over the target company to Liw Jun Wai, the taking over of Paragon Union Bhd involved the sale of shares of only two shareholders ie Kong See Kuan and Tan Onn Poh.

The two guarantees and indemnities (the 'DPSB guarantee' and Kong See Kuan's guarantee' as mentioned in paras 5(b) and 5(d) of this judgment) given by Liw Jun Wai to Paragon Union Bhd and Kong See Kuan are related to the SPA between Prestamewah Development Sdn Bhd and Paragon Union Bhd and the SPA between Liw Jun Wai and Kong See Kuan.

The loan agreement dated 19 August 2008 is between Bijak Gagah Sdn Bhd and AASB (as mentioned in para 5(e) in this judgment), where Bijak Gagah Sdn Bhd had granted to AASB, a friendly loan of RM29,778,000. The loan agreement was executed as a mechanism to be utilised to settle all amounts outstanding under the share sale agreement by Liw Jun Wai to Kong See Kuan. The monies paid under the loan agreement to AASB and the amount received was to settle the outstanding amount due under the share sale agreement to the shareholders. This was stated in the email dated 14 January 2008 from Quah Ban Hoo to Tee Guan Pian (refer to p 360 of CB 3). It is an undisputed fact that Liw Jun Wai is the beneficial owner of all shares in Bijak Gagah Sdn Bhd;

(b) in addition, evidence from the contemporaneous documents, ie the following emails, showed the link between the nine agreements:

(i) email dated 25 December 2007 from Tee Guan Pian to Quah Ban Ho (pp 355–358 of CB 3) and the attachment thereto entitled 'Project Paragon' which discussed together:

(1) Paragon Union Bhd's purchase of DPSB for the purchase consideration of RM28.5m to be paid in cash and internally funded by Paragon Union Bhd, which had to be agreed by Tan Onn Poh and Kong See Kuan;

(2) 'Cash and cash equivalent in Paragon' which meant funds in Paragon Union Bhd needed to implement the take-over scheme;

(3) 'To obtain a term loan to finance purchase of (DPSB) or sell off to 3rd party for cash'. Loan to be arranged by Tan Hong Kien or Liw Jun Wai, which referred to the loan agreement. Quah Ban Ho was to follow up on this;

(4) 'Amount due to creditors (Kong See Kuan and Tan Onn Poh to agree ...)' which related to the court case; and

(5) 'consideration due to (Tan Onn Poh)' which was related to Liw Jun Wai's purchase of Tan Onn Poh's AASB shares.

Although Paragon Union Bhd and AASB are separate entities, the take-over scheme require that steps were to be taken simultaneously with Tan Onn Poh and Kong See Kuan;

(ii) email dated 14 January 2008 from Quah Ban Ho to Linda Goh (p 361 of CB 3) which referred to more than one contract and other matters related to the take-over scheme:

Project PUB

Agreements to be concluded:

(i) Sale and purchase of 25% block of AVSB from TOP for RM5.0 million;

(ii) Sale and purchase of a company with JV rights from Datuk L for *RM28.5million*. The cash received is to finance loan to AVSB;

(iii) Loan of RM27.5million from Datuk L nominee company to AVSB to repay completely loan from Kong See Kuan at a discount ...

(iii) email dated 16 April 2008 from Quah Ban Ho to Tan Hong Kien (copied to Liw Jun Wai) (at p 381 of CB 3) which showed discussion on the following agreements:

(1) DPSB agreement;

(2) Dominion guarantee;

(3) payment schedule for the purchase of Tan Onn Poh's AASB shares; and

(4) the thread of emails from 30 April 2008–15 May 2008 which discussed the court case, the loan agreement, Liw Jun Wai's guarantee to Kong See Kuan and the settlement agreement;

(iv) email dated 22 May 2008 from Tan Hong Kien to Quah Ban Ho and Tee Guan Pian (copied to Liw Jun Wai) (at p 385 of CB 3) considered together with the DPSB agreement, second AASB agreement and the settlement agreement:

(1) 'Basically we vet through 3 Agreements ie Dominion, TOP and 12.54 settlement.'; and

(2) 'In this way, we will get tha (sic) ball rolling rather than still talking about the agreements. With the acquisition approved, the agreements will have to be completed asap by every party in order for the money to cross!';

(v) email dated 13 June 2008 from Tan Hong Kien to Quah Ban Ho, Tan Hong Kien (at p 386 of CB 3) confirmed that he had spoken to Liw Jun Wai regarding both the settlement agreement and the second AASB agreement;

(vi) email dated 18 July 2008 (copied to Liw Jun Wai), Tee Guan Pian informed Quah Ban Ho (p 392 of CB 3):

> Please issue final draft for all agreements (sic) after incorporating comment from Madam Kong side by Monday. Target signing date is next Friday. Also please provide amended Settlement Agreement;

(vii) Tee Guan Pian's email dated 22 July 2008 to Linda Goh and Quah Ban Ho (copied to Tan Hong Kien and Liw Jun Wai) (at p 393 of CB 3) discussed the nine agreements altogether which shows that they are part of the common scheme in a single composite transaction:

> Today we manage to resolve a few issues as follows:
>
> (a) Loan Agreement from BGSB to AASB — no further comments/pending draft final copy;
>
> (b) KSK sale agreement — no further comments/pending draft final copy;
>
> (c) TOP sale agreement — agreed to take out reference make on DPSB and replaced by a letter to clarify the extension for payment date ...;
>
> (d) Settlement Agreement — Linda (DW 4)/Ms Low (DW 5)/ HK (DW 2) to email to Quah (PW 5) the comments asap;
>
> (e) Letter of Comfort (DPSB Guarantee) — waiting for Ms Low (DW 5);
>
> (f) DPSB Agreement — Linda (DW 4) already emailed to HK (DW 2) and DW 2 to email to Quah (PW 5). Once Linda (PW 5) email back the draft final HK(DW 2) will see Mr Michael and Lawyer Teoh

(Paragon Union Berhad's directors) to convince them on the agreement.

(viii) Linda Goh's email dated 23 July 2008 to Quah Ban Ho (copied to Tee Guan Pian) (p 409 CB 3) stated:

Dear Quah,

1. DPSB, PUB, AASB-KSK, TOP, Paragon, are signing the agreement simultaneously.

2. For DPSB Agreement, PUB pays to vendors: Dato Liw and Prestamewah in their equal shareholdings in DPSB but KSK and TOP has (sic) to wait until FIC is approved (sic);

3. AASB and TOP do not get paid the initial consideration until FIC is obtained.

(ix) Tan Hong Kien's email to Liw Jun Wai dated 5 August 2008 (p 413 of CB 3) was 'final amendment' to various agreements. That email stated:

Bro,

TOP Agreed!!

He will sign SPA now, ... (*this refers to the AASB Agreement with Tan Onn Poh*)

He will sign all share transfer form in 60 days then the money will cross in one bullet payment on that date. (the date will be fixed same as the day FIC approved DPSB You need to check with Quah how come they deleted the put and call option for the RM1.5 mil shares?

(x) Tan Hong Kien's email sent at 11.18am, 11 August 2008 to Tee Guan Pian, Linda Goh, Low Chooi Ping and Quah Ban Ho (at p 422 of CB 3), which discussed the latest development on the various agreements:

(A) The letter to link DP n TOP has minor amendment: ...

(B) On the TOP Agreement (*the AASB Agreement with Tan Onn Poh*) ...

(C) Settlement Agreement) — pending Ms Low;

(D) Letter of undertaking/guarantee-pending Ms Low (this refers to Liw Jun Wai 1's Guarantee to Madam Kong-pending Ms Low Chooi Ping);

(E) Dominion agmt ...

('DP' refers to DPSB and 'TOP' refers to Tan Onn Poh).

(xi) Tee Guan Pian's email sent at 3.03pm on 11 August 2008 to Tan Hong Kien (at p 422 of CB 3) (copied to Linda Goh and Low Chooi Ping) said that:

Dato (*Liew Jun Wai*) will come out RM7 m + buying 1.5 m shares for the deal. Please assist on 2.3 million.

A On the face of the nine agreements, nowhere the nine agreements state that Liw Jun Wai was required to pay anything. Therefore, on a balance of probability, this payment by Liw Jun Wai must therefore be a payment for the composite transaction in respect of the take-over scheme; and

B (xii) Quah Ban Ho's email dated 11 August 2008 (p 432 of CB Vol 3) to Tee Guan Pian, Tan Hong Kien and Liw Jun Wai and the payment schedule, the source and the application of funds from all parties clearly proved a composite transaction to execute the take-over scheme. During cross C examination of Tan Hong Kien, he agreed that there was his initial and handwriting date of '19.8.08' on the table of payments.

(c) further, the contents of the following three documents had contemplated a D series of agreements to form a composite transaction to implement the take-over scheme:

(i) as at 21 December 2007, the letter of offer from Ch'ng Beng Kian (Ch'ng Beng Kian of Messrs Ch'ng, Suhanna & Co wrote to Tan Onn Poh) who acted for Liw Jun Wai, referred to the following agreements:

E (1) cl 4 referred to Liw Jun Wai's proposed purchase of Tan Onn Poh's AASB 25% block of shares in AASB which led to the AASB agreement with Tan Onn Poh;

F (2) cl 4(b) provided as a condition precedent for Liw Jun Wai's purchase of Tan Onn Poh's AASB shares that Kong See Kuan's AASB shares should also be sold to Liw Jun Wai. This provision clearly envisaged the AASB Agreement with Kong See Kuan; and

G (3) cll 4(c) and 5(b) clearly referred to what was later concluded as the DPSB agreement;

(ii) in the memorandum of agreement dated 2 February 2008 (signed by Liw Jun Wai and Tan Onn Poh):

H (1) cl 3.2.1(a) mentioned Liw Jun Wai's purchase of Tan Onn Poh's AASB shares. This agreement was subsequently signed ie the AASB agreement with Tan Onn Poh;

(2) cl 3.2.1(b) provided for the sale of all the issued and paid up share capital of DPSB. This agreement was subsequently signed ie the I Dominion Park Agreement;

(3) cl 4.1(a) stated that the consideration for Paragon Union Bhd's NTA to be above RM70m until full completion of the corporate exercise. In all probability this 'corporate exercise' mentioned herein refers to the take-over scheme; and

(4) cl 4.1(e) envisaged a sale and purchase agreement of Kong See Kuan's AASB shares. This agreement was subsequently signed;

(iii) Bijak Gagah Sdn Bhd's letter of offer to AASB dated 16 April 2008:

(1) cl 5.2 referred to the loan agreement;

(2) cl 7.2 — power of attorney to be granted by AASB to Bijak Gagah Sdn Bhd; and

(3) cll 7.3, 8.1 and 8.2 — transfer of all of AASB's shares in Paragon Union Bhd to Bijak Gagah.

(d) clearly, the contents of the nine agreements are interlinked in its purpose and objective which ultimately resulted in Paragon Union Bhd being under the control of Liw Jun Wai, which was the ultimate goal of the plan;

(e) although it was submitted that, it was in evidence by the lawyer for the plaintiffs, ie Ch'ng Beng Kian (PW3) that he was never instructed by Liw Jun Wai to have the two agreements, (ie Tan Onn Poh shares sale agreement and the DPSB agreement) to be a composite agreement, (refer to p 732 of the RA Bundle B) that is irrelevant, as it has been proven that they are connected. They have been shown to be inter related to buy over the AASB shares in order to have control of Paragon Union Bhd;

(f) in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324; [2001] 1 CLJ 779, which was referred to, by the learned trial judge, this court held that:

> When all the agreements are read together what comes across with sharp clarity is the fact *that a breach of any of the terms of one of the agreements triggers a breach of all the agreements* ... In other words all these agreements are to be looked upon as forming part and parcel of one and the same transaction. (Emphasis added.)

(g) applying what was held in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd* to the facts in our present appeal, the breach of the SPA with Kong See Kuan does not trigger the breach of the SPA with Tan Onn Poh. That was the point of submission by the defendants. However, that is not the only aspect to be looked at here. The two SPAs were entered into by the plaintiffs and it is to be looked into, with the other agreements, to ascertain the intention of the agreements being executed, that is to buy over AASB shares. The two SPAs (together with the other agreements) form part of a transaction to gain control of Paragon Union Bhd. In the case of *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165, it was held that:

> It is settled rule of construction that *where several documents forming part of one transaction are executed contemporaneously*, all the documents must be read together

A as if they are one (see *Manks v Whiteley* [1912] 1 Ch 735). This principle was followed in *Idris bin Haji Mohamed v Ng Ah Siew* [1935] 1 MLJ 257, where Terrell J at p 261 said:

B > It is a well known rule of construction that where the arrangement between parties is *contained in several documents all executed simultaneously*, all the documents must be read together to ascertain the intention of the parties, and it is corollary from this that the intention must be gathered from the documents as a whole. (Emphasis added.)

C The operational words as stated in *Mohamed Isa & Ors v Abdul Karim & Ors* are 'several documents forming one transaction' and also where the arrangement between the parties is contained in several documents executed simultaneously.

D (h) if one were to peruse the contents of the several agreements, one would find that they constituted a composite transaction for the purpose of the taking over of Paragon Union Bhd. The arrangement of the parties was contained in the several agreements which were subsequently executed simultaneously at Regal House on 18 August 2008, which is AASB's registered business address;

E (i) therefore, the learned trial judge did not err when she found that the nine agreements constitute a composite transaction to implement the take-over scheme, when she relied on the contemporaneous documentary evidence which we have alluded to, in the preceeding paragraphs of this judgment;

F (j) it is also pertinent to note that Paragon Union Bhd in Kuala Lumpur High Court Suit No 22NCVC-574 of 2014 (Suit 574) had instituted proceedings against Low Chooi Ping, their lawyer, and her partner, after Appeal 1202 was filed. In Suit 574, it was pleaded that:

G (i) Looi Chooi Ping's firm was negligent in advising Paragon Union Bhd in respect to the DPSB agreement;

(ii) the nine agreements including DPSB agreement were used in *a single transaction involving the taking-over of Paragon Union Bhd;* and

H (iii) in defence, Low Chooi Ping's firm pleaded, amongst others, that there was a scheme for Liw Jun Wai to take over Paragon Union Bhd; and

I (k) clearly, the averments in the pleadings of Suit 574 amounts to a judicial admission, which in law, stands on a higher footing than evidentiary admission (see Federal Court case of *Yam Kong Seng & Anor v Yee Weng Kai* [2014] 4 MLJ 478 at p 487D). Hence, Paragon Union Bhd cannot be blowing hot and cold as to it's stand on the single transaction issue for the purpose of the take-over scheme. It is estopped from denying that the DPSB agreement is part of the

composite transaction in the taking over of Paragon Union Bhd.

Issue on illegality

[46] Apart from concluding that the nine agreements constituted a composite transaction to implement the take-over scheme, the learned High Court judge also found that the agreements were illegal, void and unenforceable, due to breaches of the following provisions:

(a) s 132C of the Companies Act 1965;

(b) Chapters 10–11 of the Listing Requirements of Bursa Malaysia ('the listing requirements'); and

(c) s 33B(1) and (2) of the SCA read together with s 6 of the 1998 Code.

Section 132C(1) of the Companies Act 1950

[47] Section 132C(1)(a) of the Companies Act 1965 provides that approval of company in a general meeting is required for the acquisition of an undertaking or property of a substantial value.

Under s 132C(1A) of the same, the term 'substantial value' for a listed company shall mean the same value prescribed under the provisions of the listing requirements:

(a) *which relates to acquisitions* or disposals *by a company* or its subsidiaries to which such provision applies; and

(b) *which would require the approval of shareholders at a general meeting in accordance with the listing requirements.*

[48] Section 10.06 of the listing requirements, requires a shareholders approval of a general meeting for a transaction where the *percentage ratio* of the acquisition is equal to or exceeds 25% of the net tangible assets (NTA).

Percentage ratio is defined under s 10.02(h) as, among others, the value of the assets which are the subject matter of the transaction, compared with the net assets of the listed company.

[49] A breach of s 132C(1)(a) of the Companies Act 1965 is an offence under s 132C(5) of the Companies Act 1965.

[50] The plaintiffs contend that the purchase of shares by Paragon Union Bhd in DPSB represented an acquisition of an undertaking of property of a substantial value which requires shareholders' approval of a general meeting.

The plaintiffs contend that as no approval of shareholders was obtained, the purchase of DPSB by Paragon Union Bhd is in breach of s 132C(1)(a) of the Companies Act 1965 read together with paras 10.05 and 10.06 of the listing requirements. The learned trial judge adopted these contentions by the plaintiffs and found that the shareholders' approval was required for the DPSB agreement since the total consideration was RM28.5m. She held that 'based on the facts and circumstances of ... case ... on a balance of probabilities, parties intended to circumvent the requirement under s 132C(1)(a) of the Companies Act 1965 by intentionally reducing the consideration in DPSB agreement. Thus the DPSB agreement is also forbidden by virtue of s 132C(1)(a) and (5) of the Companies Act 1965' (refer to paras 58–65 of the grounds of judgment of the learned trial judge).

In this regard, it is crucial to ascertain the purchase price of the DPSB shares, to determine whether there has been an acquisition of a substantial value by Paragon Union Bhd, in order to determine whether ss 132C(1) and (2) of the Companies Act 1965 applies.

What was the purchase consideration of the DPSB agreement

[51] The plaintiffs relied on cl 3 of the DPSB agreement dated 19 August 2008 which states that the total purchase price of the DPSB shares is RM28.5m. The defendants on the other hand contend that it is RM18m.

Parties agreed that if the purchase consideration for the DPSB agreement is RM28.5m, that would amount to an acquisition of a substantial value, whereby the requirement under s 132C of the Companies Act 1965 must be complied with. It is otherwise, if the purchase price is RM18m.

[52] The learned trial judge found that the purchase consideration was RM28.5m, rendering the acquisition to be of a substantial value, therefore shareholders' approval is required for the DPSB agreement (para 62 of the grounds of judgment), as stipulated under s 132C(1)(a) of the Companies Act 1965.

[53] The learned High Court judge accepted the evidence of Quah Ban Ho who testified that the DPSB agreement was concluded at RM18m to circumvent the need for shareholder's approval (paras 62–63 of the learned trial judge's grounds).

[54] The learned trial judge's finding was also based on the following evidence:

(a) a memorandum of agreement dated 20 February 2008 between Tan Onn Poh and Liw Jun Wai wherein:

(i) cll 3.2.1(b), (c) and 4.1(f) provide RM28.5m as the total consideration for the DPSB agreement; and

(ii) cll 3.2.1(c), 3.2.(a), (b) and 4.1(b) wherein it provides that shareholders' approval was required for the DPSB agreement;

(b) at a meeting with MIMB Investment Bank Bhd on 4 March 2008 which was attended by Liw Jun Wai, Quah Ban Hoo, Tee Guan Pian and Tan Hong Kien, MIMB had already advised the need for a shareholders' approval for the DPSB agreement. In an email from MIMB's Ms Lee Yoke Wah (Ms Lee), it was stated that the cash consideration was RM28m and there was a need for a shareholders' approval. MIMB's assistance was sought to obtain the shareholder's approval.

[55] Our perusal of the memorandum of agreement dated 20 February 2008 show that the initial purchase price for the DPSB shares was at RM28.5m. This is one of the salient terms of the memorandum of agreement which was initially proposed by Tee Guan Pian in his email dated 20 October 2007 (refer to pp 344 and 356 of CB Vol 3).

The defendants submitted that the said sum of RM28.5m stated in the memorandum of agreement dated 20 February 2008, was subjected to an independent valuation and due diligence of DPSB. The defendants referred to cl 7 of the memorandum which states, that it is 'for the purposes of enabling the parties to negotiate and agree on the terms and conditions of the formal SPA …'. Therefore, the defendant submitted that there is no finality in the terms for the sale of DPSB shares and RM28.5m is certainly not conclusive, if premised on the memorandum of agreement.

[56] However, we found that, apart from the provision in the memorandum of agreement dated 20 February 2008, there is evidence of various emails, the contents of which, suggest that the purchase price is RM28.5m, namely:

(a) an email which was from Tee Guan Pian which consists of attachments thereto which can be found at pp 354–356, 359–360, 364, 394, 410 and 413 in the CB Vol 3. At p 356, wherein it refers to 'purchase of private limited company Dominion Park Sdn Bhd (DPSB) active in property development for purchase consideration of *RM28.5 million* to paid [sic] in cash and internally funded by Paragon …';

(b) the email at p 359 of CB Vol 3 which is between Tee Guan Pian and Liw Jun Wai whereby there is attached a letter which states 'loan for Kong See Kuan — RM27.5 million'; and

(c) the email from Tee Guan Pian to Quah Ban Ho where it mentioned about the loan agreement to Kong See Kuan, which relates to the Bijak Gagah Loan which is one of the nine agreements.

[57] In addition, there was a valuation done by Raine & Horne pursuant to the instructions from Paragon Union Bhd for purposes of acquisition, to value the development rights belonging to DPSB which can be found at p 3049 of RA Part C, specifically at p 3047 where the valuation arrived at was RM28m. Further, there is an email from MIMB to Paragon Union Bhd and Tee Guan Pian where it mentioned the other valuation at RM54m (p 376 of CB Vol 3).

[58] The plaintiffs maintained all along that the purchase consideration was RM18m, however, PW3 (Ch'g Beng Kian), the solicitor acting for Liw Jun Wai, gave evidence that RM28.5m was the firm price but on paper it was made to appear as RM18m due to the side arrangement of RM10.5m (eefer to the evidence of Ch'ng Beng Kian at p 7243 of RA Part B Vol 3). This is consistent with the evidence of Liw Jun Wai, namely RM10.5m would be made available to Liw Jun Wai when he takes over Paragon Union Bhd.

[59] Tan Onn Poh said that the original price was RM28m but later it was changed to RM18m. His evidence was contradictory to the valuation done by Raine and Horne. The valuation documents was Paragon Union Bhd's and this is a Part B documents where admissibility is not an issue. It was only on the question of weight to be considered by the court. Nobody gave evidence on behalf of Paragon Union Bhd.

[60] The learned trial judge relied largely on the evidence of Quah Ban Ho, who did not even know about the arrangement of RM10.5m. However, it was also in the evidence of Quah Ban Ho who said that the reduced price from RM28.5m to RM18m was to circumvent the EGM approval (refer to p 807 RA Vol 3 Part B).

[61] The evidence also showed that, as early as 21 December 2007, the letter of offer from Messrs Ch'ng, Suhanna & Co to Tan Onn Poh (p 2294 of *RR Jld* 8 *Bahagian* C, para 4(c)) already state the requirement precedent of the shareholders approval for the DPSB agreement. Further, as rightly pointed out by the learned trial judge, the memorandum of agreement dated 20 February 2008 between Tan Onn Poh and Liw Jun Wai provided:

(a) RM28.5m as the total consideration for the DPSB agreement — cll 3.2.1(b), (c) and 4.1(f) of the memorandum of agreement; and

(b) EGM approval was required for the DPSB agreement — cll 3.2.1(c), 3.2.2 (a), (b) and 4.1(b).

In the MIMB meeting on 4 March 2008 in MIMB's office which was attended by, amongst others, Liw Jun Wai, Quah Ban Ho, Tee Guan Pian and Tan Hong Kien, MIMB had already advised the need for EGM approval for DPSB agreement. This can be seen from the following:

(a) email from MIMB's Ms Lee dated 5 March 2008 to Tee Guan Pian, Tan Hong Kien and Quah Ban Ho stating that the 'cash consideration for the DPSB Agreement was RM28 million and there was a need for EGM Approval'. Further MIMB's assistance was sought to advise and assist Paragon Union Bhd to obtain EGM approval; and

(b) subsequent to the said MIMB's email, Tan Hong Kien and Quah Ban Ho each sent two separate email dated 7 March 2008 where none of these two emails deny the RM28.5m consideration for the DPSB agreement. Nor did these two emails deny the need for the EGM approval as advised by MIMB in its email.

[62] From the evidence, even before the DPSB agreement was signed, there were already contemporaneous documents showing that the purchase consideration for DPSB agreement was at RM28.5m. It was also in evidence during cross examination by the defence counsel, whereby the defence counsel tendered the valuation report by Raine and Horne which states valuation was at RM54m. This was the first valuation done and it was based on projection of profits. This was the report which was referred to by MIMB at the MIMB meeting. There was another valuation report by Raine and Horne at RM28.5m which came subsequent to the MIMB meeting because of the necessity for the valuer to comply with the Security Commission's requirements in respect of the valuation of the purchase of the property. There was no valuer called at the trial to verify the valuation. In any event, the second valuation was under Part B of the bundle of document. Even so, whichever valuation report is referred to, the purchase consideration cannot be RM18m and in all probability, it is RM28.5m. This is to be read together with the three contemporaneous documents, ie 21 December 2007 letter of offer from Messrs Ch'ng, Suhanna & Co, memorandum of agreement dated 20 February 2008 and the MIMB meeting attended by Liw Jun Wai, Quah Ban Ho, Tee Guan Pian and Tan Hong Kien, which all referred to the purchase consideration at RM28.5m for the DPSB agreement.

[63] Premised on the oral evidence and the contemporaneous documentary evidence, they lend support to the finding that the purchase price for the DPSB agreement was RM28.5m. The learned trial judge did not err when she concluded that the purchase price was RM28.5m.

[64] Coming back to s 132C(1)(a) of the Companies Act 1965, it was established that prior and post the DPSB agreement, the net tangible asset of

Paragon Union Bhd was in excess of RM73m. This brings the ratio of percentage of the net tangible asset of Paragon Union Bhd to 39.4%, which is an acquisition of substantial value, coming within the realm of s 132C(1)(a) of the Companies Act 1965 and the listing requirements.

[65] Consequently, as there has been no shareholders' approval of a general meeting for the DPSB agreement, there is a breach of s 132C(1)(a) and (1A) of the Companies Act 1965 read together with paras 10.05 and 10.06 of the listing requirements. The learned trial judge did not err when she made the findings that the DPSB agreement is forbidden by virtue of s 132C(1)(a) of the Companies Act 1965.

Section 33B of the SCA — Mandatory general offer

[66] It is a mandatory requirement under s 33B(1) and (2) of the Securities Commission Act 1993 ('the SCA') read together with s 6 of the 1998 Code that a person *who acquires or proposes to acquire* control in a public listed company, must make a general offer to all existing shareholders of the said listing company. Failure to do so constitutes an offence under s 33B(4) of the SCA which states:

> 33B(1) A person who makes a take-over offer shall do so in accordance with the provisions of the Code and any ruling made under subsection 33A(4).
>
> (2) Subject to section 33C, an acquirer who has obtained control in a company shall make a take-over offer, other than in respect of voting shares of the company which at the date of the offer are already held by the acquirer or which the acquirer is entitled to exercise, in accordance with the provisions of the Code and any ruling made under subsection 33A(4).

Section 6 of the 1998 Code states:

> 6(1) This part applies to —
>
> (a) An acquirer; or
>
> (b) An acquirer who holds more than 33 % but less than 50% of the voting shares of a company and such acquirer or intends to acquire in any period of six months more than 2 % of the voting shares of the company.
>
> (2) ...
>
> (3) (deleted)
>
> (4) An acquirer who —
>
> (a) has obtained control in a company; or
>
> (b) Holds more than 33% but less than 50% of the voting shares of a company and such acquirer acquires in any period of six months more than 2% of the voting shares of the company.

shall extend an offer to the offeree shareholders in accordance with the requirements of this Code.

[67] The mandatory general offer requirement to existing shareholders, is a statutory obligation of an acquirer of 33% or more issued shares of a public listed company.

[68] It was submitted by the defendants that the whole purpose of the nine agreements was to avoid the general offer. This can be seen from the earliest email dated 20 October 2007 (p 344 of CB *Jld* 3) from Tee Guan Pian to Melvin M Marks where it is stated '... the concept is to avoid GO'. This was when the whole purpose of the transaction was mooted.

[69] The finding of the learned trial judge after referring to the case of *Securities Commission v Up & Famous Sdn Bhd & Ors* [2010] 7 MLJ 701; [2010] 4 CLJ 638 which followed *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657 and applying it to our present case, is that all parties in this case, including Liw Jun Wai, had acted in concert to enable Liw Jun Wai to take control of Paragon Union Bhd. Liw Jun Wai failed to make a mandatory general offer to the existing shareholders of Paragon Union Bhd, thereby offending the provisions of s 33B(4) of the SCA which states:

Any person who contravenes subsection (1), (2) or (3) shall be guilty of an offence and shall on conviction be punished with a fine not exceeding one million ringgit or imprisonment for a term not exceeding ten years or both.

[70] In this regard it is important to determine the following:

(a) who is the acquirer;

(b) whether the acquirer has obtained 33% control or more of Paragon Union;

(c) who are the parties acting in concert;

(d) whether the circumstances in our case triggered the requirement of the mandatory general offer; and

(e) whether there has been a breach of the SCA and the 1998 Code.

At the same time, it is pertinent to note the following evidence:

(a) Chaw Choi Kew purchased Tan On Poh's 25% shares in AASB. The sale of shares agreement was dated 13 November 2008 between Tan Onn Poh and Chaw Choi Kew (p 2222 J-7C of RA);

(b) the announcement by Paragon Union to Bursa Malaysia on the particulars of substantial security holder on 13 November 2008 (p 3660 J-12C of RA);

(c) sale of shares between Liw Jun Wai and Kong See Kuan dated 19 August 2008 (p 2147 of J-7C of RA); and

(d) letter of termination dated 5 March 2009 from Kong See Kuan to Liw as to the sale of shares agreement (p 2358 J-8C of RA).

Who is the acquirer/proposed acquirer and whether the acquirer/proposed acquirer has obtained control of Paragon Union

[71] 'Acquirer' is defined in SCA in s 33 as:

(1) In this Division —

'Acquirer' means —

(a) A person who *acquires or proposes to acquire* control in a company whether the acquisition is effected by the person or by an agent; or

(b) Two or more persons who, acting in concert, with one another, acquire or propose to acquire control in a company, whether the acquisition is effected by the persons or by an agent;'

'company' in relation to a company being taken over means a public company.

'control' in relation to an acquisition of shares means the acquisition or holding of, or entitlement to exercise or control the exercise of, voting shares of more than thirty-three per centum in a company.

[72] In respect of the sale of shares of AASB, there are two sale and purchase agreements, namely:

(a) between Liw Jun Wai and Kong See Kuan (75% AASB share transaction); and

(b) between Chaw Choi Kew and Tan Onn Poh (25% AASB share transaction).

[73] As to the sales and purchase agreement between Chaw Choi Kew and Tan Onn Poh, Chaw Choi Kew acquired 25% of the shares of Tan Onn Poh in Asia Avenue. Chaw Choi Kew paid Tan Onn Poh for the shares, who then transferred the voting rights in the shares to Chaw Choi Kew. Therefore Chaw Choi Kew controlled 12.12% in Paragon Union Bhd.

[74] As for the sale and purchase agreement between Liw Jun Wai and Kong See Kuan (which was for the purchase of 75% of shares in AASB) the sale of shares was terminated as Liw Jun Wai failed to pay the balance purchase price

to Kong See Kuan. Hence, there was no transfer of Kong See Kuan's shares in AASB to Liw Jun Wai. Therefore, it was submitted by the defendant that Liw Jun Wai never had any voting rights in AASB nor in Paragon Union Bhd. At any point in time, the register of shares never reflected Liw Jun Wai as an indirect/direct shareholder of Paragon Union Bhd. Counsel for the defendants submitted that Liw Jun Wai never acquired any substantial shareholding of Paragon Union Bhd, therefore the threshold of 33% test was never triggered for the mandatory general offer to take effect.

[75] With respect we are unable to agree with the aforesaid submission, as the definition of 'acquirer' clearly includes any person 'who acquires or *proposes to acquire* control in a company ...'. Although Liw Jun Wai subsequently failed to acquire a substantial portion of the AASB shares, he falls within the definition of 'a person who proposes to acquire ...' and his proposal to acquire the AASB's shares would definitely cross the threshold of 33% requirement.

[76] Therefore, it is the statutory obligation of Liw Jun Wai to make the mandatory general offer as the 'acquirer' who proposes to take control of Paragon Union Bhd vide the two separate sales and purchase agreements through the purchase of AASB's shares with Kong See Kuan and Tan Onn Poh's shares respectively.

[77] The onus is on the 'acquirer', Liw Jun Wai to make a mandatory general offer to other shareholders.

[78] The learned trial judge concluded that the take-over scheme was successfully executed and all parties have participated in the take-over scheme and had committed an offence by failing to comply with s 33B(1), either as a principal or as an abettor to circumvent the requirement of a mandatory general offer to enable Liw Jun Wai to take control of Paragon Union Bhd. She held that in this regard all parties had committed an offence under s 33B(4) of the SCA.

[79] We found that the learned trial judge did not err when she made such findings.

Whether the parties are in pari delicto

[80] The learned trial judge found from the evidence that the parties were *in pari delicto*. Premised on the said evidence, the learned trial judge found that there is illegality in respect of the nine agreements and by virtue of s 24 of the Contracts Act 1950 the nine agreements are void and unenforceable.

[81] We found that the learned trial judge did not err in this respect for the following reasons:

(a) it was in evidence that the working paper or the proposal (via email 20 October 2007) on Paragon Union Bhd was known to Tee Guan Pian, Liw Jun Wai and Quah Ban Ho. The working papers were discussed, negotiated, amended and put into writing by parties ie Liw Jun Wai, Tan Hong Kien, Kong See Kuan. Although Tee Guan Pian is not a party to the agreements and not an agent nor representative of Tan Onn Poh, Kong See Kuan, AASB and Paragon Union Bhd, from the evidence, he was the one who hatched the idea of taking over Paragon Union Bhd. There was evidence of several meetings between Tee Guan Pian and Liw Jun Wai and subsequently with Tan Hong Kien to discuss details of taking over of Paragon Union Bhd. Tan Hong Kien was roped in as he had access to the current financial accounts of Paragon Union Bhd which would greatly assist parties in the take-over scheme. It was also in evidence that Tee Guan Pian cautioned Liw Jun Wai to keep those discussions private and confidential for fear of penal consequences;

(b) it was submitted by the defendants that there is no evidence to show that Tee Guan Pian gave the working paper to Tan Hong Kien, Tan Onn Poh, Kong See Kuan, AASB and Paragon Union Bhd. That may be true, but from the evidence, namely, the subsequent meetings and the emails between parties and their lawyers showed that they were very much aware of the take-over scheme and the nine agreements of which they are privy to, whether directly or indirectly:

(i) as early as 20 October 2007, Tee Guan Pian's email already advised on the circumvention of a mandatory offer — 'Concept is to avoid GO'; and

(ii) the email from Tee Guan Pian dated 4 December 2007 to Liw Jun Wai and Quah Ban Ho with the attachment entitled 'Project Papa' which stated in para 3.3 as follows:

> 3.3. New Code will be coming out most probably early 2008 which GO threshold will be revised from 33% to 30 %. There would be GO implication again ...

(c) the defendant submitted that the plaintiffs pleaded in their claim at para 28B(f) that Paragon Union Bhd knew of the infringement of the laws, however no evidence was adduced to prove as such. What is in evidence is that, Paragon Union Bhd made public announcements of the DPSB Agreement to Bursa Malaysia. Paragon Union Bhd is in the business of property development and had just completed and sold off its Paragon Heights Project and was looking for new ventures. Paragon Union Bhd expected that the acquisition of DPSB could improve its

earnings and cash flow when the property is being developed. Hence, the defendants submitted that there is no evidence of any intention on the part of Paragon Union Bhd to advance an unlawful purpose.

However, that submission cannot stand, as it failed to take into account that there has not been a disclosure of Raine & Horne's first valuation report which had a valuation of RM54m, to Paragon Union Bhd's shareholders and directors (other than Tan Hong Kien and Tan Onn Poh). Paragon Union Bhd had announced to Bursa and the public on 19 August 2008 that the DPSB agreement was made pursuant to Raine & Horne's second valuation report. Clearly, Bursa and the public had been misled as to the true value of the DPSB agreement;

(d) all parties knew of the RM28.5m value of the DPSB development rights but reduced it to RM18m to bypass unlawfully the EGM approval requirement. This was to circumvent the need to have the EGM Approval for the DPSB agreement;

(e) Low Chooi Ping (Paragon Union Bhd's lawyer), who is a senior lawyer testified that he was aware that a person who has control by virtue of the first and the second AASB agreements must obtain exemption from the Securities Commission to make a mandatory offer. Further, Low Chooi Ping also confirmed that the loan agreement and Kong See Kuan's power of attorney were drafted for the purpose of the take-over scheme (Q&A No 25–38 of notes of proceedings).

[82] Therefore, premised on the abovementioned evidence, the learned trial judge was not wrong when she concluded that the agreements were illegal and that the parties were *in pari delicto* or 'in equal fault'.

[83] The learned trial judge also held that all parties have acted in concert to enable Liw Jun Wai to take control of Paragon Union Bhd. A party acting in concert is defined in s 33(2) of the SCA 1993 as:

> (2) ... '*persons acting in concert*' shall be construed as a reference to persons who, pursuant to an *agreement, agreement or understanding*, co-operate to —
>
> (a) acquire jointly or severally voting shares of a company for the purpose or obtaining control of that company; or
>
> (b) act jointly or severally for the purpose of exercising control over the company.

'Acquirer' has been defined in s 33(1)(ii) of the Act to include 'two or more persons who, acting in concert with one another, acquire or propose to acquire control in a company'.

Section 33(4) of the SCA and s 2(4) of the 1998 Code provide that:

> ... an agreement, arrangement or understanding means an agreement, arrangement or understanding whether formal or informal, whether written or oral, whether express or implied, or whether or not having legal or equitable force.

[84] It was submitted by the defendants that, in one of the sale and purchase agreements, Kong See Kuan is the vendor in the sales transaction of shares, hence she would be divested of her interests therein. Therefore, she could not be acting in concert when she no longer had any interest in the shares when she sold off her interests. Similarly with Tan Onn Poh, when he sold his shares in Asia Avenue Sdn Bhd to Chow Chaw Kien, he can no longer be acting in concert.

However, we disagree with such submission, as the wide definition of 'acquirer' under s 33(1) of the SCA 1993 covers all parties herein and under s 33B(2) of the SCA, they are to make a mandatory offer.

[85] The definition of 'persons acting in concert' in s 33(2)(a) and (b) of the SCA is couched in very wide terms. Paragraph (a) talks about 'co-operate to acquire jointly or severally, voting shares of a company for the purpose of control,' whilst para (b) mentioned 'act jointly or severally for the purpose of exercising control of a company'. Paragraph (b) covers all acts of cooperation which would be caught within the definition of 'acting in concert' ... to exercise control of a company. Hence Kong See Kuan and Tan Onn Poh would fall within 'persons acting in concert'. Whether Kong See Kuan and Tan Onn Poh would be divesting their interest in the shares, is immaterial. They have 'acted in concert' with the plaintiffs to acquire Paragon Union Bhd.

[86] Under s 6(1)(a) and (4) of the 1998 Code, an 'acquirer' who has obtained control of Paragon Union Bhd, is required to make a mandatory offer. Section 7(a) of the 1998 Code prohibits the 'acquirer' from appointing any director to Paragon Union Bhd before sending an 'offer document' to implement the mandatory offer. The mandatory requirement has been explained by the Supreme Court in *Petaling Tin Bhd v Lee Kian Chan* which states that:

> ... the policy of the Code is to require a new controller to give an opportunity to the other shareholders of quitting the company and sharing in the price paid for the control or its consolidation because the character of the company, in a sense, may have changed.

[87] The plaintiffs failed to make a mandatory offer as 'acquirers' which constituted an offence under s 33B(2) and (4) of the SCA 1993.

[88] Accordingly the act of Paragon Union Bhd, Liw Jun Wai, Tee Guan Pian, Tan Hong Kien, Kong See Kuan and Tan Onn Poh constituted a breach of s 6(1)(a), 4 and 7 of the 1998 Code, read with s 33B(1) and (2) of the SCA 1993.

[89] From the evidence, the take-over scheme had been successfully executed and Liw Jun Wai had control of Paragon Union Bhd's Board of Directors from 6 November 2008 when his nominees were appointed to the Board of Paragon Union Bhd. It is clear that all parties here had acted in concert to enable Liw Jun Wai to take over control of Paragon Union Bhd.

[90] Parties also committed the following acts:

(a) acting in furtherance of the commission of an offence under s 33B(2) and (4) of the SCA which is an offence under s 157(b) of the SCA and is punishable with the same punishment under s 33B(4) of the SCA; and

(b) abetting or being engaged in a criminal conspiracy in respect of the commission of an offence under s 33B(2) and (4) of the SCA which is an offence under s 157(c) of the SCA and is punishable with the same punishment under s 33B(4) of the SCA.

[91] In addition, there were also breaches by the parties of paras 11.06, 11.07 and 11.08 of the listing requirements.

Section 11.06 of the same, provides that 'an offeree must send to all holders of other classes of shares and convertible securities of the company, whether or not such securities are covered by the take over offer, a copy of all documents which it is required by law to be sent to the holders of the shares subject to the take over offer'.

Section 11.07 of the listing requirements provides for the persons who must make immediate announcements to the Exchange of the total number and price of all voting shares in the offeror and the offeree. This includes the offeror, the offeree and all persons acting in concert with the offeror. Clearly, this was not done by the parties in this case.

> Section 11.8 provides that 'an offeror must make an immediate announcement to the Exchange of the total number of voting shares to which the take-over offer relates:
>
> 1. For which acceptances of the take-over offer have been received after the posting of the offer document by the offeror to offeree shareholders;
>
> 2. Held by the offeror and all persons acting in concert with the offeror at the time of posting of the offer document to offeree shareholders; and

A 3. Acquired or agreed to be acquired during the offer period ...'

Conclusion: The effect of the nine agreements

B **[92]** It is clear that the nine agreements are not enforceable due to s 24(a), (b) and/or (e) of the Contracts Act 1950 whereby the consideration or object of an agreement is lawful unless:

(a) it is forbidden by law;

C (b) it is of such a nature that, if permitted, it would defeat any law; and

(c) the court regards it as opposed to public policy.

[93] Therefore in view of the illegalities, the nine agreements:

D (a) are forbidden by s 33B(1), (2), (4) and 157(b) and (c) of the SCA read with s 6(1)(a), (4) and 7(a) of the 1998 Code within the meaning of s 24(a) of the Contracts Act 1950; and

(b) if permitted would defeat the statutory provisions stated in the above para (a) as provided in s 24(b) of the Contracts Act 1950.

E

[94] The DPSB agreement is therefore forbidden by:

(a) s 132C(1)(a) and (5) of the CA 1965 within the meaning of s 24(a) of the Contracts Act 1950; and

F (b) if permitted would defeat s 132C(1)(a) and (5) of the Companies Act 1965 as provided in s 24(b) of the Contracts Act 1950.

[95] In addition, the nine agreements are also void under s 24(e) of the G Contracts Act 1950 as they are against public policy. The rationale for the mandatory offer as enunciated in *Petaling Tin Bhd v Lee Kian Chan* is to protect the investing shareholders of Paragon Union Bhd and the investing public. This is to ensure that the acquisition of voting shares or control of the companies takes place in an efficient, competitive and informed market. This H is precisely the mischief of s 33A(5) of the SCA. Failure to observe the mandatory requirement will undermine Bursa locally to the detriment of the Malaysian Capital Industry.

[96] The EGM approval requirement is consistent with public interest I which demands good corporate governance from Malaysian companies, especially public listed companies as in Paragon Union Bhd.

[97] The listing requirements govern all public listed companies and their directors and advisors. This is to ensure the integrity and to protect the lawful

administration of Bursa and also to protect the investing public in general. If the listing requirement is breached, as in the present case by entering into the agreements, such agreements are void as being against public policy.

[98] The nine agreements are therefore void and unenforceable for illegality.

Refusal to grant relief to Paragon Union Bhd

[99] The learned trial judge did not grant relief for the refund of RM18m to Paragon Union Bhd which had been paid to the plaintiffs.

[100] The learned trial judge also held that the parties were aware of the breaches when they entered into the agreements. Hence, Paragon Union Bhd did not come with clean hands as it had participated in the illegal transaction. This was the distinguishing feature that the learned trial judge found in *Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 MLJ 301; [2014] 3 CLJ 141 and said that the plaintiff came clean there from the beginning. This was in contrast to our present appeal where Paragon Union Bhd never pleaded illegality nor restitution but sought instead for the remedy of breach of contract and claimed for liquidated damages under the contract (refer to para 95 of the learned trial judge's grounds of judgment). Further, the learned trial judge also found that Paragon Union Bhd had breached the 1998 Code, s 132C(1)(a) of the Companies Act 1965 and s 33 of the SCA, as compared to *Tan Chee Hoe* where it was only a breach of s 132C of the Companies Act 1965. Hence, the learned trial judge was unable to provide relief for the refund of the RM18m under s 66 of the Contracts Act 1950, as Paragon Union Bhd had participated in the illegal transaction and that its hands were tainted as such.

[101] We disagree with the findings of the learned trial judge in this respect, namely, the basis in refusing to grant the relief sought by Paragon Union Bhd for the refund of the RM18m paid to the plaintiffs for the following reasons.

[102] The learned trial judge had fallen into error as to the actual pleaded relief of Paragon Union Bhd in Suit 737 when she said that Paragon Union failed to plead for the refund of the RM18m. Our perusal of the statement of claim by Paragon Union Bhd for Suit 737 at the High Court, at pp 119–120 of RA Vol 1 Part A, shows that Paragon Union Bhd did seek in its relief, for the refund of RM18m (refer to paras 20–21 of the statement of claim).

[103] We disagree with the learned trial judge's evaluation of the facts in *Tan Chee Hoe* when the learned trial judge said that there are distinguishing facts which justified the Federal Court granting the refund of the deposit paid under the void agreement. The facts therein disclosed the plaintiff and the defendant entered into a sale and purchase agreement (SPA) to purchase the defendant's

A shares in Chee Hoe Sdn Bhd. The defendant's only asset is a piece of land. The completion date of the SPA was subjected to two conditions ie approval of the Foreign Investment Committee and approval by the defendant's shareholder at EGM for the intended sale. The plaintiff paid 10% deposit ie RM1.6m. Simultaneously with the SPA, the plaintiff executed a document (side letter) B whereby the plaintiff agreed to waive the defendant's obligations vis a vis the conditions precedent, notwithstanding that one of the condition precedent ie the approval of the defendant's shareholders at EGM was mandated by s 132C of the Companies Act 1965. Subsequently, disputes arose between parties and by the completion date, neither the balance purchase price nor vacant C possession had been exchanged between parties. The defendant terminated the sales and purchase agreement and forfeited the deposit sum. The plaintiff filed a suit in Kuala Lumpur High Court claiming for refund of the deposit. The High Court dismissed the claim stating that the waiver by the plaintiff as to the defendant's obligation was valid and did not render the sale and purchase D agreement void. The Court of Appeal however reversed the decision of the High Court whereby it held, inter alia, that the mandatory requirement under s 132C of the Companies Act 1965 could not be waived, the side letter was ineffective and void, but the SPA was not void but only voidable at the plaintiff's option. The Court of Appeal held that the defendant had breached E the SPA and ordered the refund of the deposit of RM1.6m to the plaintiff, in addition for damages to be assessed. At the Federal Court, it was held that the SPA was invalid and void as it was performed in a manner which is against the law. The Federal Court also found that the parties had knowingly and consciously participated in the contravention of the statutory requirement F under s 132C of the Companies Act 1965. The order for damages was set aside but it affirmed the order for refund of the deposit pursuant to s 66 of the Contracts Act 1950.

G **[104]** Clearly, the learned trial judge's evaluation of the facts in *Tan Chee Hoe* is misconceived. The parties in *Tan Chee Hoe* did not come with clean hands from the beginning. They willfully and knowingly breached s 132C of the Companies Act when they entered into the SPA. Further, it is irrelevant whether the breach is in relation to one section of the law or breaches of H multiple provisions of the law, as either way, is unlawful.

[105] The facts in *Tan Chee Hoe* bear some resemblance and similarity with the facts in our present appeal.

I In *Tan Chee Hoe*, the parties were *in pari delicto* when they consciously waived the requirements of s 132C of the Companies Act 1965 for the intended sale and purchase agreement. The plaintiff premised its entire claim on the terms of the SPA which was found to be void. Essentially, the plaintiff was attempting to enforce a void contract. The Federal Court applied s 66 of the Contracts Act

1950 and ordered 10% deposit of RM1.6m to be restored to the plaintiff.

As held by the Federal Court:

> The SPA in this case become void when the mandatory statutory requirement of shareholders' approval was not obtained and was consciously waived by the parties at the time when it was executed. Therefore s 66 of the Contracts Act 1950 came into play ie that the defendant who had received an advantage (in the form of the 10% deposit of RM 1.6m) under the void agreement or contract (the SPA) is bound to restore it to the plaintiff from whom he received it.

Similarly in our case, the nine agreements became void due to breaches of the various statutes as enumerated in paras 92–95 of our judgment, rendering them illegal and unenforceable. In the circumstances, applying *Tan Chee Hoe*, s 66 of the Contracts Act 1950 comes into play and the plaintiffs are bound to restore the RM18m that it had received under the DPSB agreement to Paragon Union Bhd. In ordering the RM18m to be restored to Paragon Union Bhd, we are not enforcing the DPSB agreement (which has become a void contract) but we are instead enforcing the restitutionary principle as encapsulated in s 66 of the Contracts Act 1950.

[106] Hence, we are of the view that, as the DPSB agreement has been found to be void due to illegality, and the money had passed to the plaintiffs, it is unjust to let the plaintiffs gain from such illegality. What more in this case, as the plaintiffs are very much an active participant to the illegality. In fact, it was Liw Jun Wai with Tee Guan Pian who initiated the take-over scheme. To refuse the refund would be to condone a windfall to the plaintiffs out of the illegality. That would result in a disproportionate consequence between the plaintiffs and the defendants, bearing in mind that both are equally at fault. Hence, to remedy the situation, we found that restitution is the proper recourse. We are putting parties back to their original position before they entered into the illegal agreement. In the words of Bingham LJ in *Saunders and another v Edwards and another* [1987] 1 WLR 1116, at p 1134 at para B:

> Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct ...
>
> ... the courts have tended to adopt a pragmatic approach to these problems, seeking where possible to see that genuine wrongs are righted so long as the court does not thereby promote or countenance a nefarious object or bargain which it is bound to condemn. Where the plaintiff's action in truth arises directly *ex turpi causa*, he is

A likely to fail as he did in *Alexander v Rayson* (1936) 1 KB 169 ... Where the plaintiff has suffered a genuine wrong, to which allegedly unlawful conduct is incidental, he is likely to succeed, as he did in *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 ...

B Bingham LJ in his judgment in *Saunders v Edwards* further held that cases seemed to suggest that there are no rigid rules for or against the application of *ex turpi causa* defence (see *Sajan Singh v Sardara Ali* [1960] AC 167 which was referred to by the Federal Court in *Tan Chee Hoe* and *Palaniappa Chettiar v* C *Arunasalam Chettiar* [1962] AC 294), as it involves issues on public policy and to some extent on the circumstances of each case.

[107] In this case, Liw Jun Wai had received an advantage when he received RM18m as purchase consideration under the DPSB agreement. He should D restore the advantage that he had received ie to refund RM18m that he had received from Paragon Union Bhd. In fact it was held in *Tan Chee Hoe* that 'being a void contract, by virtue of the Contracts Act 1950, the court of law may order restoration of whatever consideration or advantage paid or given under that contract ...'.

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[108] Counsel for the plaintiff submitted that the Federal Court in *Tan Chee Hoe* failed to consider the legal principle as enunciated in the case of *New Churulia Coal Co Ltd v Union of India* AIR 1956 Cal 138 where in its judgment the said court ruled at p 144:

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> [22] It is therefore apparent that the obligation to pay compensation or to restore the benefit received under a void agreement is completely different from that under the agreement itself. The obligation to make compensation in respect of the contract discovered to be void is like a phoenix that can be raised again by one of the parties from the dead ashes of its former self. Before the new right can come into G being the old right must die; the cause of action under Section 65, Contract Act cannot exist side by side with the cause of action under the contract itself.

In this respect, we are of the view that the abovesaid legal principle as H enunciated in *New Churulia Coal Co Ltd v Union of India* would not have any significant effect on our findings as far as restitution to Paragon Union Bhd is concerned.

Firstly, the case cited by learned counsel is a High Court case of Calcutta, India, I which is not binding on this court.

Secondly, by making this order for restitution under s 66 of the Contracts Act 1950, this court is not enforcing rights under the contract which is found to be void. In addition, it is to be borne in mind that there are criminal

consequences, as a result of such act which is outside the purview of this civil court. The order for restitution of the money merely return the parties to their previous position before the conclusion of the illegal contract and prevent the plaintiffs from benefiting by unjust means.

[109] Hence, we are of the view that, the RM18m ought to be refunded to Paragon Union Bhd based on the Federal Court decision in *Tan Chee Hoe*.

Appeal by Tee Guan Pian to expunge the impugned references to him and the findings of fact by the learned trial judge

[110] Counsel for Tee Guan Pian submitted that the evidence in relation to an unpleaded point cannot be relied upon and as a consequence of the withdrawal of the claim against Tee Guan Pian, none of his oral evidence should have been referred to, by the learned trial judge so as to arrive at the finding that Tee Guan Pian was the mastermind of the illegal scheme.

[111] We are however not persuaded by these arguments. Although the claim against Tee Guan Pian was withdrawn, the plea of illegality was never withdrawn. It remained until the end of the trial and the declaration sought was stated in the relief prayed for.

[112] A perusal of the notes of proceedings disclosed that, there was no request nor application made by Tee Guan Pian nor his solicitors at the trial, when the withdrawal of the claim against him was recorded that, any evidence in reference to him was to be expunged. Neither were there terms recorded nor imposed when the claim against him was withdrawn. Order 21 r 3 of the Rules of Court 2012 states that the withdrawal of any particular claim made by any party may only be done with leave of the court and the court may impose such terms as it thinks just. There were no terms recorded upon the withdrawal of the claim against Tee Guan Pian.

[113] In addition, the findings of the learned trial judge as to the role played by Tee Guan Pian in the alleged take-over scheme was not based solely on the evidence of Tee Guan Pian but a conglomeration of the evidence from the emails, meetings, letters as well as oral evidence from the other witnesses as well. The learned trial judge based her findings on the role played by Tee Guan Pian premised on the several emails of which he was the author, evidence of Liw Jun Wai, Tan Hong Kien, Kong See Kuan's lawyer and Quah Ban Hoo.

[114] The court is in no position to sever the evidence which refers to the role played by Tee Guan Pian without affecting the entire suit. The reliance by counsel for Tee Guan Pian on the case of *Adams Offshore Ltd v TL Offshore and Hallin Marina Systems Int Ltd and Anor (Third Party)* [2009] MLJU 175;

A [2009] 1 LNS 197 is misplaced. There, the withdrawal to the counterclaim renders it no longer relevant. However, in the present appeal, the issue with regards to the illegality remained a live issue until the end of the appeal. Hence, his evidence which relates to the issue of the illegality of the agreements is relevant and cannot be severed from the evidence adduced at the trial. The
B evidence in relation to the role played by Tee Guan Pian remains relevant to the entire suit.

[115] Hence, the application by Tee Guan Pian to expunge the findings of the learned trial judge in respect of his role in the alleged illegal scheme is
C unfounded. We therefore dismissed the said application.

Effect of the abandonment of the claim against Tee Guan Pian

D **[116]** Counsel for the defendants submitted that as the claim against Tee Guan Pian was abandoned by the plaintiffs, the court is no longer seized of jurisdiction to make any findings of fact against Tee Guan Pian, as the averred cause of action has been removed from adjudication. This is because the substratum of the plaintiffs' claim against Tee Guan Pian is no longer before the
E court. It was further submitted that when the claim against Tee Guan Pian was abandoned, the court is not entitled to make any findings of fact against Tee Guan Pian. In essence, it was submitted that as a result of the withdrawal of the claim against Tee Guan Pian, the court should not refer to any of the oral evidence of Tee Guan Pian to arrive at a finding that Tee Guan Pian was the
F master mind of the take over scheme.

The defendant submitted that the effect of the abandonment of the claim by the plaintiffs against Tee Guan Pian had not been addressed by the learned trial
G judge in reference to Paragon Union Bhd.

[117] The effect of the abandonment of claim by a party has been illuminated by this court in the case of *Perwira Affin Bank Bhd v Sardar Mohd Roshan Khan* [2010] MLJU 2220; [2011] 5 CLJ 886 where it was stated that:

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> [25] Given the plaintiff's aforesaid express and repeated admission that his claim against the first defendant (D1) was not based on the tort of negligence and that the plaintiff has no cause of action in tort against the first defendant, we find that the plaintiff has unequivocally abandoned his claim based on the tort of negligence against the first defendant. This abandonment must now be viewed in the light of
I the plaintiff's pleaded case, which was firmly founded on the tort of negligence. This is clearly demonstrated in the plaintiff's statement of claim.
>
> [26] Plainly, the plaintiff's aforesaid express and repeated admission has removed the substratum of his claim.

[118] However, as we have explained in the preceding paragraphs, we are of the view that despite the abandonment of the claim by the plaintiffs against Tee Guan Pian, his oral evidence remains intact. The court is entitled to use his oral evidence, wherever relevant to determine the issue of illegality and the role he played in the transactions. The crux of the plaintiffs' claim is premised on a take-over scheme of Paragon Union Bhd, a public listed company, an idea mooted by Tee Guan Pian. It was pleaded in para 27B(b)(i) in the statement of claim that it was due to the proposal by Tee Guan Pian that the illegality was mooted and/or laws circumvented. It was alleged by the plaintiffs that Tee Guan Pian had put up a working paper to that effect.

[119] Hence the court is entitled to apply whatever relevant evidence adduced by Tee Guan Pian to make any findings that it deems fit, in so far as it relates to the issue of illegality, in accordance to the evidence before it.

[120] In addition, it appears that the appeal by Tee Guan Pian is against the reasons of the learned trial judge that she premised her decision on. Essentially, there was no order made against Tee Guan Pian by the learned trial judge, as the plaintiffs have abandoned their claim against Tee Guan Pian. Therefore effectively, there is no order of the learned trial judge by which Tee Guan Pian could appeal against.

CONCLUSION

[121] For the reasons stated above, we hereby dismiss the appeal by Paragon Union Bhd (Appeal No 1202) in part with no order as to costs. We hereby order that the plaintiffs are to refund the RM18m to Paragon Union Bhd, as per the reliefs prayed for in paras 20(a) and 21(a) of the statement of claim in Suit 737 which are as follows:

(a) Prestamewah Development Sdn Bhd to pay Paragon Union Bhd RM13.5m; and

(b) Liw Jun Wai to pay Paragon Union Bhd the sum of RM4.5m.

We accordingly set aside part of the order of the learned High Court judge that refused to grant relief for the refund of the RM18m to Paragon Union Bhd.

[122] The appeal by Tee Guan Pian (Appeal No 1238) is dismissed with costs of RM5,000 to be paid to the respondents subject to allocatur and the deposit is refunded.

A *Appellant's appeal dismissed.*

Reported by Afiq Mohamad Noor

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